



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA VOI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 15 OF 2017

**IN THE MATTER OF ARTICLES 2, 3(1), 10, 19 (1), (2)(3), 20, 22, 23, 27, 47 AND 159 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 10, 27 AND 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE BETTING, LOTTERIES AND GAMING ACT CAP 131
LAWS OF KENYA**

BETWEEN

MURITHI ROBERT & 17 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF TAITA TAVETA

GETRUDE SHUWE.....RESPONDENTS

RULING

INTRODUCTION

1. The Petitioners' Notice of Motion application dated and filed on 20th November 2017 was brought pursuant to the provisions under Articles 47, (1) (2) & (3) of the Constitution of Kenya 2010, Section 1A and 1B of the Civil Procedure Act Order 40, 4(1) of the Civil Procedure Rules, Section 67 of the Betting, Lotteries and Gaming Act and other enabling provisions of the Laws of Kenya. Prayer No (1) and (2) was spent. It sought the following remaining orders:-

1. Spent
2. Spent

3. **THAT this honourable court be pleased to issue injunction orders suspending the respondent's order directing the closure of coin slot gaming machine operations within Taita Taveta County pending the hearing and determination of the petition herein.**

4. **THAT the costs of this application be borne by the respondent.**

THE PETITIONER'S CASE

2. The Petitioners' application was supported by the Affidavit of Robert Murithi that was sworn on 20th November 2017. He swore his further Affidavit filed on 9th January 2018 on the same date. His Written Submissions dated 24th January 2018 were filed on 25th January 2018.

3. Their case was that in the month of October 2017, the Respondents issued them with a directive suspending operation of their businesses and that attempts to resolve the matter out of court had borne no fruit.

4. They contended that the National Betting Lotteries and Gaming Act 2016 (hereinafter referred to as "the Act") bound counties before they could enact their own legislation in respect of slot coin gaming machines. They were emphatic that the Respondents were not the enforcement agency of the Betting Control and Licencing Board (hereinafter referred to as "the Board").

5. They referred this court to the provisions of Section 8 (2) of the County Government Act that stipulate as follows:-

"If a county assembly fails to enact any particular legislation required to give effect to the functions of the county government, a corresponding national legislation if any shall with necessary modifications apply to the matters in question until the county assembly enacts the required legislations."

6. They argued that it was the mandate of the Board to license gambling operations premises and authorise gambling machines.

7. It was their contention that the suspension of operations of the slot coin gaming machines, which they had carried out within the confines of the law, had caused them mental anguish and/or distress because most of the said machines had been acquired on credit and the Petitioners were unable to pay their creditors as a result.

8. They further argued that suspending their operations when other operators were operating the same was discriminatory against them. They urged this court to consider the order of 4th November 2016 that had been issued in **Constitutional Petition No 447 of 2016** which had barred the Board from stopping the operations of slot coin gaming machines.

9. It was their submission that as the operations of the Board were suspended by virtue of the said order, no licences or authorisation could be issued, and consequently, the Respondents could not contend that they were acting in breach of the Act and thus suspend their operations.

10. They averred that it was the responsibility of the 1st Respondent to enact legislation to govern operations of the slot coin gaming machines and that they could not be subjected to hardship as it was not known when such legislation would be put in place. They said that they sought and obtained the licenses for their businesses which was a clear indication that they were carrying out their businesses in good faith.

11. They submitted that if an injunction was not granted against the Respondents, they would suffer irreparable loss as they would be unable to service the loans. They thus urged this court to grant them the orders that they had sought because the balance of convenience tilted in their favour.

THE RESPONDENTS' CASE

12. In response thereto, on behalf of the Respondents herein, Getrude Shuwe swore the Replying Affidavit on 4th December 2017. The same was filed on the same date. Their advocate, Bwire Okano, swore a Further Affidavit on 10th December 2017. The same was filed on 18th December 2017. The Respondent's List of Authorities was dated 4th November 2017 and filed on 4th December 2017. They filed Further List of Authorities and Written Submissions both dated 23rd February 2017 on 26th February 2018.

13. The Respondents argued that prior to the promulgation of the Constitution of Kenya, all betting, lotteries and gaming activities were regulated under the Act and that the same provided penalties for offences that were committed under the Act.

14. They pointed out that the 4th Schedule of the Constitution lists gambling, casinos and other forms of gambling among the functions to be devolved to county governments.

15. They submitted that Section 8(2) of the County Government Act was clear that if a County Government had not enacted a law, then the corresponding national legislation would remain in force until the county legislation was enacted.

16. They stated that they found that the Petitioners were operating without obtaining licences, the machines had not been approved by the Board, and young persons were being allowed to use the said machines, which they contended, was a serious breach of the Act.

17. They averred that although the Petitioners had annexed permits they had issued them with, the Petitioners did not provide proof that they obtained licenses from the Board. They were emphatic that the Petitioners had not complied with the Act.

18. They submitted that for an interlocutory injunction to be granted, there must be a serious question to be tried and relied on the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others** in this regard.

19. They raised the question of which was the applicable law governing the gaming machines noting that betting, lotteries and gaming operations were concurrent functions both under the National and County governments. They relied on several cases to buttress their argument. They also contended that the licenses the Petitioners annexed in their Further Affidavit were not licences from the Board but rather they were business permits.

20. They submitted that the Petitioners had not demonstrated that they would suffer irreparable loss as was contemplated in the case of **American Cynamid vs Ethicon Ltd.** They averred that the only loss the Petitioners had demonstrated was loss of profit which were quantifiable and recoverable by way of payment in cash from the 1st Respondent who had ability to pay the said monies.

21. They argued that the balance of convenience could not tilt in favour of the Petitioners who were operating outside the law. They therefore urged this court to dismiss their application with costs.

22. The reliefs the Petitioner had sought were as follows:-

- i. A declaration that the defendant's directive was unlawful, unfair and/or unjust.**
- ii. An order of permanent injunction barring the defendant's servants and/or agents from arresting confiscating and or interfering with the Plaintiffs' coin slot gaming machines operation within Taita Taveta County.**
- iii. A declaration that the Petitioners were entitled to protection under the constitution to**

their right to fair administrative actions, equality and freedom from discrimination and fair treatment.

iv. General and exemplary damages be assessed and awarded to the petitioners for gross curtailment of their fundamental rights and the loss of business they had suffered as a result.

v. The Honourable courts do issue such orders and give such directions as it may deem fit and just.

vi. The costs of the Petition be paid by the Respondents.

23. A perusal of each of the receipts that were attached to the Petitioners' Supporting Affidavit showed that there was a payment of one (1) slot machine in the sum of Kshs 10,000/= unlike the entries for Single Business permit charges. It was not clear what the said payment was for. Notably, the Petitioners contended that this was payment of licenses to the 1st Respondent while the Respondents averred that the said amount was for business permits.

24. Notably, whereas both the Petitioners and Respondents were in agreement that the National Government legislation would be applicable until the county government legislation was enacted, they were not agreed as to whether the 1st Respondent could enforce the provisions of the Act on behalf of the Board. Those are questions that could only be answered were serious in nature.

25. Having considered the parties Written Submissions and the case law they relied upon, this court was dissuaded from delving too much in the contested issues because that would be delving into the merits of the said Petition. Indeed, the role of this court was limited to establishing whether or not it could grant an interlocutory pending the hearing and determination of the Appeal herein.

26. Whilst this court agreed with the Respondents that the 1st Respondent could compensate the Petitioners for any loss they would incur if an interlocutory injunction was not granted, this court was satisfied that the Petitioners had established a *prima facie* case and that the balance of convenience tilted in their favour for this court to grant the said equitable relief.

DISPOSITION

27. For the foregoing reasons, the decision of this court was that the Petitioners Notice of Motion application dated and filed on 20th November 2018 was merited and the same is granted in terms of prayer No (3) therein. Costs shall be in the cause.

28. The Petitioners are hereby ordered to file and serve upon the Respondents, an undertaking for paying damages in the event they are successful in their Petition, within the next fourteen (14) days from today.

29. The Petitioners are hereby further directed to take a mention date at the High Court of Kenya Voi Registry within the next fourteen (14) days for the Presiding Judge High Court of Kenya Voi to give further orders and/or directions for the disposal of the Petition herein.

30. It is so ordered.

DATED at NAIROBI this 12th day of June 2018

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at VOI this 20th day of June 2018

F. AMIN

JUDGE